SUPREME COURT, U.S.
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No. _____

In The

Supreme Court of The United States

October Term, 1994

MARIE BLACK

Petitioner,

VERSUS

J. I. CASE

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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43 pp

QUESTIONS PRESENTED

1. Whether, in light of contrary holdings of other circuits, the holding by the Court of Appeals for the Fifth Circuit that the district court's denial of summary judgment was not reviewable on appeal where there had been a subsequent trial on the merits and a jury verdict adverse to the movant is in error?

2. Is it proper to deny a motion for summary judgment where the party opposing the motion has not offered any factual evidence, by way of affidavit or otherwise, in opposition of the motion?

3. Is the rule applied by the Court of Appeals for the Fifth Circuit, refusing to hear appeals of denials of motions for summary judgment, to be applied prospectively or retroactively?

4. Is the grant of partial summary judgment in any way procedurally distinct from the denial of summary judgment so that the grant of partial summary judgment may be reviewed on appeal and denial of summary judgment may not?

LIST OF ALL PARTIES

Plaintiff-Appellant

Marie Black, Individually and as Representative of Randy Black, Pam Black Gum, Kitty Black, Adults, and William Black and Tammy Black, Minors the Sole and Only Heirs at Law of Romie Black

Defendant-Appellee

J. I. Case

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In The

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October Term, 1994

MARIE BLACK

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PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Marie Black, Petitioner, petitions for Writ of Certiorari to review the Fifth Circuit's decision of May 27, 1994 which Affirmed the Trial Court's Order Denying Plaintiffs' Motion for Partial Summary Judgment dated May 10, 1991.

OPINIONS BELOW

The Trial Court Order denying partial summary judgment dated May 10, 1991, issued in conjunction with a Memorandum Opinion, was not published. The Trial Court Order and Memorandum Opinion are included as Appendix B.

The May 27, 1994 Memorandum opinion of the Court of Appeals for the Fifth Circuit, whose judgment is herein sought to be reviewed, is reported at 22 F.2d 568 (5th Cir. 1994) and is attached as Appendix A.

JURISDICTION

The Court has jurisdiction, by Writ of Certiorari under 28 U.S.C. Section 1254, to review the decision of the United States Court of Appeals for the Fifth Circuit entered on May 27, 1994.

STATEMENT OF THE CASE

On September 8, 1986, Petitioner's decedent, Romie Black (hereinafter "Black"), borrowed a used 1979 Case Model 580-D backhoe from Respondent's retail store in Tupelo, Mississippi while Black waited for Respondent to make changes and modifications to a second backhoe, 1979 Case Model 580-C serial number 8983508, which Black was purchasing from Respondent. Five days later, Black was killed when the seat locking mechanism on the substitute backhoe, an integral part of the machine's rollover protection system (hereinafter "ROPS"), failed

causing the seat to rotate downward catapulting Black into the left rear ROPS steel post, killing him instantly. Black was the sole income provider for petitioner and their five children.

Petitioner brought suit in the Circuit Court of Lee County, Mississippi on March 26, 1990. Respondent removed the case to the United States District Court for the Northern District of Mississippi alleging jurisdiction based upon complete diversity of citizenship.

On January 4, 1991, Petitioner filed her Motion for Partial Summary Judgment as to Liability. In her Motion for Partial Summary Judgment, Petitioner alleged that Case: 1) breached its implied warranty of merchantability with respect to the loan of the substitute backhoe; 2) failed to warn Black of latent defects in the backhoe and to instruct Black in the operation of the backhoe; and 3) failed to inspect the backhoe prior to its loan to Black as required in the owner's manual.

On January 18, 1991, Respondent filed its Response to Plaintiff's Motion for Partial Summary Judgment, along with its Memorandum of Authorities in Opposition to Plaintiff's Motion for Partial Summary Judgment. In support of its Response, Respondent offered no evidentiary support in the form of affidavit or otherwise to contradict the undisputed facts that existed at the time Petitioner filed her Motion for Partial Summary Judgment.

The trial court subsequently denied Petitioner's Motion.

Following a full trial on the merits, Petitioner moved for a directed verdict which the district court denied. The jury returned its verdict for Respondent. The district court, then, denied Petitioner's motion for judgment notwithstanding the verdict (j.n.o.v.) or for a new trial.

Petitioner appealed the district court's denial of her motion for partial summary judgment to the United States Court of Appeals for the Fifth Circuit. Citing its own precedent and several supporting decisions of other circuits, but also noting other contrary opinions both within the Fifth Circuits and in other Circuits, the Fifth Circuit held that the pre-trial denial of a motion for summary judgment would not be reviewed where, on the basis of a subsequent full trial on the merits, final judgment is entered adverse to the movant. 22 F.2d 568 (5th Cir. 1994).

ARGUMENT

THIS COURT SHOULD GRANT THE WRIT SINCE THERE IS A SPLIT OF AUTHORITY AMONG THE CIRCUITS AND AMONG THE DECISIONS OF THE COURT OF APPEALS FOR THE FIFTH CIRCUIT

The United States Court of Appeals for the Fifth Circuit, in determining that orders denying summary judgment would not be reviewed where there had been a full trial on the merits and a subsequent verdict adverse to the movant, announced, rather perfunctorily, that its decision was "in harmony with the overwhelming majority of the other circuits which have considered the issue." In

support of its statement, the court cited cases from the Sixth, Eighth, Ninth, Tenth and Federal Circuits as constituting its majority.

While there may be, arguably, considerable support for the decision of the Fifth Circuit among the other circuits, the very fact that the Fifth Circuit stated that it is in the majority of circuits necessarily implies that there is at least one, and perhaps more than one, circuit which has not taken the position assumed by the Fifth Circuit regarding the appealability of denials of summary judgments. Such a split of authority certainly compels the Court to grant *certiorari*. In *F.T.C. v. Flotill Prod., Inc.* 389 U.S. 179 (1967), this Court granted *certiorari* where the decision of the Court of Appeals from which appeal was made conflicted with decisions of other Courts of Appeals. Also, in *U.S. v. California Eastern Line*, 348 U.S. 351 (1955), *certiorari* was granted where courts of appeals for two circuits had interpreted differently their reviewability of Tax Court renegotiation orders.

Federal Rule of Civil Procedure 56 provides the framework by which litigants are to employ summary judgment and by which trial courts are to either grant or deny such motions. Appeals of grants or denials are not governed by the rules, but, rather, by 28 U.S.C. Sections 1291 and 1292(a) & (b). For any ruling of a district court to be reviewable, it must be a final order, with few notable exceptions. Obviously, there is no immediate right to appeal the denial of a motion for summary judgment because the court of appeals, in most instances, does not have jurisdiction to hear the appeal of an interlocutory order. *See Sacred Heart Med. Center v. Sullivan*, 958 F.2d

537 (3rd Cir. 1992); *Duran v. City of Douglas, Arizona*, 904 F.2d 1372 (9th Cir. 1990); *Gometz v. Culwell*, 850 F.2d 461 (8th Cir. 1988); *Senza-Gel Corp. v. Seiffhart*, 803 F.2d 661 (Fed. Cir. 1986).

However, the problem and, thus, the dispute among the circuits arises when a movant attempts to appeal the denial of his motion for summary judgment after final judgment has been entered following a jury verdict against him.

The Fifth Circuit's decision refusing to review denials of motions for summary judgment is in accord with the decisions of several circuits. *See Summit Petroleum v. Ingersoll-Rand,* 909 F.2d 862 (6th Cir. 1990); *Bottineau Farmers Elevator v. Woodward-Clyde Consultants,* 963 F.2d 1064 (8th Cir. 1992); *Lum v. City and County of Honolulu*, 963 F.2d 1167 (9th Cir. 1992), *certiorari denied* 113 S.Ct. 659 (1992); *Boyles Galvanizing & Plating Co v. Hartford Accid. & Indemn. Co.*, 372 F.2d 310 (10th Cir. 1967); *Claros v. H. H. Robertson Co.*, 797 F.2d 1564 (Fed. Cir. 1986).

However, in *Savarin Corp. v. National Bank of Pakistan,* 447 F.2d 727 (2d Cir. 1971), the Second Circuit reviewed the district court's denial of summary judgment where the movant lost at trial and then appealed the final judgment to the Court of Appeals. Although the Second Circuit did not overturn the district court's denial of summary judgment, as should be done in the instant case, its decision shows that, in the Second Circuit, denials of summary judgment will be reviewed after the movant has had a full trial.

Also, the Eleventh Circuit has stated that denials of motions for summary judgment could not be appealed where the moving party conceded that the facts at the time of trial were sufficient to place before a jury. *Holley v. Northrop Worldwide Aircraft Serv.*, 835 F.2d 1375 (11th Cir. 1988). Where the facts at trial were not sufficient to place before a jury, or where the movant did not concede such, the Eleventh Circuit would review the denial of a motion for summary judgment. Such would be the circumstances in the instant case.

In addition, the Seventh Circuit will review all antecedent interlocutory rulings on appeal from the district court's final judgment. *Reilly v. Waukesha Co., Wis.*, 993 F.2d 1284 (7th Cir. 1993); *Edwin Raphael Co. v. Maharan Fabrics Corp.*, 283 F.2d 310 (7th Cir. 1960).

Even the circuits relied upon in the Fifth Circuit's opinion below will review other interlocutory orders on appeal from final judgment. *Dickinson v. Auto Center Mfg. Co.*, 733 F.2d 1092 (5th Cir. 1983) (interlocutory denying directed verdict merges and may be reviewed on appeal); *Hellerstein v. Mr Steak, Inc.*, 531 F.2d 470 10th Cir. 1976), *certiorari denied* 429 U.S. 823 (1976); *Jarrett v. Epperly*, 896 F.2d 1013 (8th Cir. 1990) (other interlocutory orders merge into final judgment and may be appealed).

As recently as January 25, 1993, during the pendency of this, the Court of Appeals for the Fifth Circuit itself stated that a defendant's notice of appeal placed before the court each of the trial court's adverse rulings against defendant, *including its pretrial denial of defendant's motion for summary judgment*, even after an adverse

verdict against defendant. *Satcher v. Honda Motor Co., Ltd.*, 984 F.2d 135 (5th Cir. 1993) (Satcher I). Although this case was subsequently vacated on other grounds, the court never recanted the doctrine espoused in Satcher I. *Satcher v. Honda Motor Co, Ltd.*, 993 F.2d 56 (5th Cir. 1993) (Satcher II). *See also Albatross Shipping Corp. v. Stewart*, 326 F.2d 208 (5th Cir. 1964) (order is final for purposes of appeal only when order terminates litigation; order granting partial summary judgment was not final for purposes of appeal and correctness of ruling could be challenged if and when case was appealed from final judgment).

CONCLUSION

Surely, *certiorari* should be granted when such a conflict arises among the United States Circuit Courts of Appeal. The Fifth Circuit's determination that denials of motions for summary judgment are never appealable where there has been an adverse jury verdict against the movant conflicts with the Eleventh Circuit's decision in *Holley v. Northrop Worldwide Aircraft Serv.* and the Seventh Circuit's decision in *Reilly v. Waukesha County.* The Fifth Circuit's decision goes even further and creates a conflict with existing authority within the Fifth Circuit. *See Albatross Shipping* and *Satcher I, supra.* The split among the decisions of the Fifth Circuit leaves the distinct impression that a portion of the Fifth Circuit views the denial of a summary judgment reviewable on appeal even after an adverse jury verdict on the merits against the adverse. As such, there is a compelling basis for granting the writ in this case to resolve the significant conflict among the circuits and within the Fifth Circuit. Petitioner,

therefore, respectfully prays that this writ be granted and this conflict be settled.

Respectfully submitted,

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In The

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APPENDICES

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 91-7010

MARIE BLACK, Individually and as representative of RANDY A. BLACK, PAM BLACK GUM, KITTY BLACK, adults, and WILLIAM A. BLACK and TAMMY BLACK, minors, the sole and only heirs at law of ROMIE BLACK

Plaintiffs-Appellants

versus

J.I. CASE,

Defendant-Appellee

Appeal from the United States District Court
for the Northern District of Mississippi

Before GARWOOD and HIGGINBOTHAM, Circuit Judges, SCHWARTZ* District Judge. GARWOOD, Circuit Judge:

* District Judge of the Eastern District of Louisiana, sitting by designation.

This is a Mississippi diversity case arising from the death of Romie Black (Decedent) who was killed in an accident involving a backhoe. His successors, plaintiffs-appellants herein (collectively, the Blacks), appeal the judgment on the jury verdict in favor of defendant-appellee J.I. Case Company, Inc. (Case). We affirm.

This appeal was previously considered by another panel of this Court which issued an opinion affirming the judgment below. This earlier opinion was subsequently withdrawn and vacated.[2] *Black v. J.I. Case Co.* 973 F.2d 1226, 1227-31 (5th Cir. 1992). It appears likely that the withdrawal was because of a perceived uncertainty concerning the propriety of reviewing an interlocutory order denying summary judgment on an appeal following trial on the merits and final judgment based thereon adverse to the summary judgment movant.[3] We now conclude that this Court will not review the pretrial denial of a motion for

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[2] The prior panel thereupon assigned the case to the calendar, and in due course it was reassigned to this panel.

[3] It seems that the perceived conflict was likely with *Satcher v. Honda Motor Co.*, 984 F.2d 135 (5th Cir. 1993). In *Satcher*, this Court reviewed and reversed the district court's denial of the defendant's summary judgment motion, after the defendant received an adverse judgment following trial on the merits. *Id.* at 137. However, the original *Satcher* opinion has also been vacated and withdrawn, and it has been replaced by *Satcher v. Honda Motor Co.*, 993 F.2d 56 (5th Cir. 1993). The new *Satcher* opinion does not address the issue of whether a denied summary judgment motion should be reviewed on appeal after a full trial on the merits.

summary judgment where on the basis of a subsequent full trial on the merits final judgment is entered adverse to the movant.[4]

FACTS AND PROCEEDINGS BELOW

On September 13, 1986, Decedent was killed while operating a backhoe loaned to him by Case when the machine rolled over and his head struck one of the posts which supported the backhoe's canopy. On March 26, 1990, the Blacks, as successors to Decedent's interest, brought this suit against Case. They subsequently filed a motion for partial summary judgment as to liability for breach of an implied warranty of merchantability, failure to warn of latent defects, failure to instruct the operator on the safe operation of the machine, and failure to inspect. Case opposed the motion for summary judgment, contending that it did not cause the accident, but rather that the Decedent's death was caused by his operation of the backhoe on too steep a slope while not wearing a seatbelt. Case, however, did not submit any summary

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[4] This decision in no way affects our holdings regarding a district court's interlocutory determinations that are subject to immediate review such as its ruling concerning a party's partial or total immunity from suit. *See e.g. Spann v. Rainey*, 987 F.2d 1110 (5th Cir. 1993); *Mobile Corp. v. Abeille General Ins. Co.*, 984 F.2d 664 (5th Cir. 1993); *Williams v. Collins*, 728 F.2d 721 (5th Cir. 1984). Nor does it concern our decisions reviewing denied motions for summary judgment where the district court granted the opposing party's summary judgment motion. *See Ranger Ins. Co. v. Estate of Mijne*, 991 F.2d 240, 241 (5th Cir. 1991).

judgment evidence to support its position, but rather relied on the Blacks' summary judgment evidence which included answers to interrogatories indicating Case's anticipated expert testimony at trial and affidavits of Case's employees. The district court denied the Blacks' partial summary judgment motion noting that their own evidence created factual disputes as to each asserted theory, and that, in any event, the court had the power to deny summary judgment where it thought "the better course would be to proceed to trial."

The case was subsequently fully tried on the merits. At the close of all the evidence, the Blacks made a motion for a directed verdict which the district court denied. The jury thereafter found for Case. The Blacks then filed for judgment notwithstanding the verdict (j.n.o.v.) or for a new trial. The motions were also denied by the district court. The Blacks now bring this timely appeal, arguing that the district court erred in denying their motion for partial summary judgment, and that it also erred in several other respects. We affirm.

DISCUSSION

I. Motion for Summary Judgment

The Blacks first argue that the district court erred in denying their motion for partial summary judgment because Case failed to present any evidence to create a disputed fact issue. Based on earlier precedent of this Court and other circuits, the Rules of Civil Procedure, the discretion of district courts in this area, and other prudential concerns, we agree with the prior panel's conclusion that

this order should not be reviewed.

This court has already held that an interlocutory order denying summary judgment is not to be reviewed where final judgment adverse to the movant is rendered on the basis of a subsequent full trial on the merits. *See Wells v. Hico ISD,* 736 F.2d 243, 251 n.9 (5th Cir. 1984), *cert. dismissed,* 106 S.Ct. 11 (1985); *Zimzores v. Veterans Administration,* 778 F.2d 264, 267 (5th cir. 1985).[5] In *Wells*, the defendants-appellants suffered an adverse judgment entered on the jury's verdict following full trial on the merits, and prior to trial the district court had denied their motion for summary judgment on the question whether the plaintiffs-appellees had a property interest in their teaching positions. 736 F.2d at 251. We held that

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[5] Only one case, in dicta, has suggested by inference that an interlocutory order denying summary judgment is reviewable. *See Dickinson v. Auto Center Mfg. Co.*, 733 F.2d 1092 (5th Cir. 1983). There, this Court rightly held that it could review the district court's order overruling the appellant's motion for a directed verdict at the close of the evidence. *Id.* at 1102; *see Fed. R. Civ. P.* 50(d). However, in nonbinding dicta, the *Dickinson* court noted that "a party may obtain review of prejudicial adverse interlocutory rulings upon his appeal from adverse final judgment." *Id.* This over-broad dicta might imply that all interlocutory orders-including denials of motions for summary judgment-may be reviewed on appeal. However, the decision does not discuss any other interlocutory rulings. Such an unexplained generalization is nonbinding in the face of this Court's specific holdings to the contrary. *See e.g. Nicor Supply Ships Associates v. General Motors,* 876 F.2d 501,506 (5th Cir. 1989).

the district court's rulings denying the summary judgment motions could not be reviewed because, "Once trial began, the summary judgment motions effectively became moot." *Id.* at 251 n.9. Similarly, in *Zimzores*, we declined to review the denial of the plaintiff-appellant's motion for summary judgment which contended that there existed no factual dispute as to liability. We noted that "it is particularly difficult to understand how the ends either of justice or of orderly procedure would be furthered were we to hold that the plaintiff is entitled to summary judgment when the facts adduced at the full trial on the merits adequately support the findings and judgment for the defendants." 778 F.2d at 267. By reaffirming our rule announced in these cases that orders denying summary judgment motions will not be reviewed in such circumstances, we remain in harmony with the overwhelming majority of other circuits which have considered the issue. *See Bottineau Farmers Elevator v. Woodward-Clyde Consultants*, 963 F.2d 1064, 1068-69 n.5 (8th Cir. 1992); *Lum v. City of Honolulu*, 963 F.2d 1167, 1170 & n.1 (9th Cir.), *cert. denied* 113 S.Ct 659 (1992); *Summit Petroleum v. Ingersoll-Rand*, 909 F.2d 862, 865 n.4 (6th Cir. 1990); *Jarrett v. Epperly*, 896 F.2d 1013, 1016 (6th Cir. 1990); *Locricchio v. Legal Services Corp.*, 833 F.2d 1352, 1359 (9th Cir. 1987); *Claros v. H.H. Robertson Co.*, 797 F.2d 1564, 1573 & n.14 (Fed. Cir. 1986), *cert. dismissed*, 107 S.Ct. 1262 (1987); *Boyles Galvanizing & Plating Co. v. Hartford Accident & Indemnity Co.*, 372 F.2d 310, 312 (10th Cir. 1967).[6]

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[6] One circuit has decided a case that could be read as supporting a dual system for evaluating denied motions for

summary judgment in such circumstances. *See Holley v. Northrop Worldwide Aircraft Services, Inc.*, 835 F.2d 1375, 178 & n.7 (11th Cir. 1988). Under this dichotomy, if the motion were denied on "factual" grounds (e.g., no evidence as to an element required under governing law), then the order should not be reviewable. However, if the motion were denied on "legal" grounds (e.g., the elements that must be proven under governing law), then that determination should be reviewable. The first problem with fashioning this dichotomy is that the Wells court refused to review a summary judgment motion that was at least arguably based on "legal" grounds-whether the plaintiffs had a property interest in their teaching positions. 736 F.2d at 251 n.9. Second, even if this issue had not already been foreclosed in this Circuit, another difficulty with such a system is distinguishing between "factual" and "legal" issues. All summary judgments are rulings of law in the sense that they may not rest on the resolution of disputed facts. We recognize this by our de novo standard of reviewing summary judgments. *See e.g. Green v. Touro Infirmary*, 992 F.2d 537, 538-39 (5th Cir. 1993); *Moore v. Eli Lilly & Co.*, 990 F.2d 812, 815 (5th cir. 1993); *Davis v. Illinois Cent. R.R.*, 921 F.2d 616, 617-18 (5th Cir. 1991). Moreover, our ability to distinguish such "factual" and "legal" issues will be hampered in instances (which are by no means rare) where the district court gives no, or only very generalized, reasons for denying the motion. In any event, such a dual approach would require us to craft a new jurisprudence based on a series of dubious distinctions between law and fact. And, such an effort-added to the tasks of already overburdened courts of appeal-would benefit only those summary judgment movant who failed to properly move for judgment as a matter of law at the trial on the merits. *Fed. R. Civ. P.* 50. If such motions are properly made, the denied motions for summary judgment need not be reviewed, because

Furthermore, the rule reaffirmed today is in keeping with Federal Rules of Civil Procedure 50(a) and (b), and our related jurisprudence. We have long recognized that where a party has a judgment rendered against him based on an adverse jury verdict, judgment may not be rendered for him on appeal (and j.n.o.v. in his favor may not be granted) unless that party has moved for a directed verdict in the district court. *See e.g. Hinojosa v. City of Terrell,* 834 F.2d 1223, 1228 (5th Cir. 1988), *cert. denied,* 110 S.Ct. 80 (1989); *McConney v. City of Houston,* 863 F.2d 1180, 1186-88 (5th Cir. 1989); *see also Johnson v. New York, N.H. & H.R. Co.,* 73 S.Ct. 125, 128 (1952). However, reviewing on appeal a pretrial denial of a motion for summary judgment would circumvent this rule by allowing us to reverse and render even when no motion for directed verdict and motion for j.n.o.v. had been made at trial. If such motions have been made, their denial can be reviewed on appeal and there is no good reason to also review the pretrial denial of the same party's motion for summary judgment.

To review pretrial denials of summary judgment motions would also diminish the discretion of the district court, in contravention of our jurisprudence and that of the

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the "legal" issues determined by the district court are freely reviewable, and the case may be reversed and rendered on that basis. *See e.g. Knowlton v. Greenwood ISD,* 957 F.2d 1172, 1177-78 (5th Cir. 1992); *Cotton Bros. Baking Co. v. Indus. Risk Insurers,* 941 F.2d 380, 390-91 (5th Cir. 1991), *cert. denied,* 112 S.Ct. 2276 (1992); *Nesmith v. Alford,* 318 F.2d 110, 118 (5th Cir. 1963), *cert. denied,* 84 S.Ct. 489 (1964).

Supreme Court. The Supreme Court has recognized that, even the absence of a factual dispute, a district court has the power to "deny summary judgment in a case where there is reason to believe that the better course would be to proceed to a full trial." *Anderson v. Liberty Lobby, Inc.*, 106 S.Ct. 2505, 2513 (1986). We, too, have recognized that (except in cases of qualified or absolute immunity) a district court "has the discretion to deny a [motion for summary judgment] even if the movant otherwise successfully carries its burden of proof if the judge has doubt as to the wisdom of terminating the case before a full trial." *Veillon v. Exploration Services*, 876 F.2d 1197, 1200 (5th Cir. 1989); *see also Marcus v. St. Paul Fire & Marine Ins.*, 651 F.2d 379, 382 (5th Cir. 1981). If we were to review denied motions for summary judgment, the district court would no longer have this discretion.

Finally, prudential concerns argue against reviewing such motions. To review the pretrial denial of a motion for summary judgment, we would have to review two different sets of evidence: the "evidence" before the district court at pretrial when it denied the motion, and the evidence presented at trial. Of course, the "evidence" presented at pretrial may well be different from the evidence presented at trial. it makes no sense whatever to reverse a judgment on the verdict where the trial evidence was sufficient merely because at summary judgment it was not.[7] As we

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[7] This seems to be the Black's motivation in asking us to review their denied summary judgment motion. They made a motion for directed verdict and j.n.o.v., so any points of error concerning the district court's decisions regarding the

noted in *Woods v. Robb*, 171 F.2d 539 (5th Cir. 1948): "The saving of time and expense is the purpose to be attained by a summary judgment in a proper case. When in due course the final trial is had on the merits it becomes the best test of the rights of the movant. If he wins on trial he has his judgment. If he loses on a fair trial it shows that he ought not to have any judgment." *Id.* at 541. For all of these reasons, we are firmly convinced that the better course is to decline to review the district court's denial of motions for summary judgment when the case comes to us on the movant's appeal following adverse judgment after full trial on the merits.

II. Remaining Issues

The Blacks argue that the district court also erred by: (1) refusing to grant their motion for directed verdict; (2) allowing Case to amend the pretrial order to allege that the accident was caused by the sole negligence of Decedent; (3) refusing to allow testimony regarding the position of the backhoe's boom at the time of the accident; (4) instructing

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applicable law or insufficient trial evidence are freely reviewable. *See Boeing v. Shipman*, 411 F.2d 365 (5th Cir. 1969). It makes no difference whether we review the district court's "legal" decisions under the rubric of the denied summary judgment or the directed verdict motion. *See Hamilton v. Grocers Supply Co.*, 986 F.2d 97, 98 (5th Cir. 1993) (noting that "[t]he standard of review for a directed verdict is the same as that for review of a summary judgment:). Rather, the Blacks obviously hope that we will reverse based on the embryonic facts that existed before trial, as opposed to the fleshed-out facts developed at trial.

the jury regarding Decedent's misuse of the backhoe; and (5) refusing the allow the jury to consider awarding punitive damages. Having reviewed the record and briefs, we conclude that the prior panel opinion correctly disposed of and adequately addresses all these issues, none of which are of a precedential nature or otherwise appropriate for publication.

We would merely add that as to the first issue, the Blacks, in support of their contention that the district court should have granted their motion for directed verdict because of insufficient evidence, point to the recent Mississippi Supreme Court decision in *Sperry-New Holland v. Prestage*, 617 So. 2d 248 (Miss. 1993). The *Sperry* court adopted a "risk-utility" analysis for products liability cases. *Id.* at 256. The district court, here, in accordance with our precedent, used a "consumer-expectations" analysis in trying the Blacks' products liability theory. Consistent with this analysis, Case relied, in part, on the "open and obvious" defense. The Blacks argue that this defense does not exist under the "risk-utility" analysis. As noted by the *Sperry* court, such a defense is now "simply a factor to consider in determining whether a product is unreasonably dangerous." *Id.* at 265 n. 4. However, what has not changed is the Blacks' burden to prove under a products liability theory that the defective condition caused the physical harm to the ultimate user of the product. *Id.* at 253. Here, the evidence was not such as to require the jury to find that the defective condition was a cause of

Decedent's injuries.[8] Therefore, the change in analysis does not establish that the district court erred in denying the Blacks' motion for directed verdict.

As to the second issue concerning the district court's allowing Case to amend the pretrial order on the first day of trial, the Blacks claim that they were unfairly surprised because the amendment added a new defense.[9] However, the district court offered the Blacks a continuance which they declined. Where a party claims unfair surprise "the granting of a continuance is a more appropriate remedy than exclusion of the evidence." *Fed. R. Evid.* 403 advisory committee's note. If the Blacks were prejudiced

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[8] The Blacks, in a separate point of error, argue that Case should be foreclosed from arguing that Decedent was the sole proximate cause of his death. We disagree for the reasons stated in the prior opinion.

[9] This alleged new defense is that Case would seek to show that Decedent was the sole proximate cause of his death instead of a proximate cause. This did not affect the Blacks' calculus of the types of evidence they would have to refute, and it did not interject a new issue into the proceeding. We also note that this Court has stated that it has "limited reversible error from unfair surprise to situations where a completely new issue is suddenly raised or a previously unidentified expert witness is suddenly called to testify." *F & S Offshore*, 662 F.2d at 1108 (citing *Shelak v. White Motor Co.*, 581 F.2d 1155 (5th Cir. 1978)). Neither of these conditions obtain here. We need not determine whether in special circumstances we might go beyond the categories mentioned in *F & S Offshore*, for here there is certainly no strong showing of unfairness or prejudice.

by unfair surprise, the district court's offer of a continuance rectified any error that might have occurred. *See F & S Offshore, Inc. v. K.O. Steel Castings, Inc.* 662 F.2d 1104, 1108 (5th Cir. 1981) (holding that the district court did not abuse its discretion in admitting new evidence where the complaining party "failed to urge a motion for continuance in response to what they now contend is unfair surprise").

CONCLUSION

Accordingly, the judgment of the district court is

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 91-7010

D.C. Docket No. EC90-85-D-D

MARIE BLACK, Individually and as representative of RaNDY A. BLACK, PAM BLACK GUM, KITTY BLACK, adults, and WILLIAM A. BLACK and TAMMY BLACK, minors, the sole and only heirs at law of ROMIE BLACK,

Plaintiffs-Appellants

J.I. CASE COMPANY, INC.

Defendant-Appellee

Appeal from the United States District Court for the Northern District of Mississippi

Before GARWOOD and HIGGINBOTHAM, Circuit Judges, SCHWARTZ,* District Judge.

J U D G M E N T

* District Judge of the Eastern District of Louisiana, sitting by designation.

This cause came on to be heard on the record on appeal and was taken under submission on the briefs on file.

ON CONSIDERATION WHEREOF, IT is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is affirmed.

IT IS FURTHER ORDERED that plaintiffs-appellants pay to defendant-appellee the costs on appeal to be taxed by the Clerk of this Court.

May 27, 1994

ISSUED AS MANDATE: June 20, 1994

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

MARIE BLACK, INDIVIDUALLY AND AS
REPRESENTATIVE OF RANDY BLACK, ET AL

Plaintiffs,

vs. CIVIL ACTION NO. EC 90-85-D-D

J.I. CASE

Defendant

ORDER DENYING PLAINTIFFS'
MOTION FOR PARTIAL SUMMARY JUDGMENT

In accordance with a memorandum opinion entered this day, plaintiffs' motion for partial summary judgment is denied.

ORDERED, this 10th day of May, 1991.

/S/ GLEN H. DAVIDSON
GLEN H. DAVIDSON
United States District Judge

FILED
May 10, 1991
JAMIE WALKER, Clerk
By Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

MARIE BLACK, INDIVIDUALLY AND AS
REPRESENTATIVE OF RANDY BLACK, ET AL

Plaintiffs,

vs. CIVIL ACTION NO. EC 90-85-D-D

J.I. CASE

Defendant

MEMORANDUM OPINION

This matter comes before the court on plaintiffs' motion for partial summary judgment. The case involves a complaint for wrongful death which allegedly occurred on September 13, 1986 when plaintiffs' decedent, Romie Black, was operating a backhoe loaned to him by the defendant. Originally filed in the Circuit Court of Lee County, Mississippi, the action was removed to this court on the basis of diversity jurisdiction. Plaintiffs allege that the defendant is liable under three theories: 1) breach of warranty of merchantability; 2) negligent failure to instruct and warn; and 3) negligent failure to inspect the backhoe.

Claiming the absence of genuine issues of material fact, plaintiffs have moved for partial summary judgment on the issue of liability only. However, the court finds that far too many facts are in conflict for summary disposition

of the several liability questions in this case. Because summary judgment is ordinarily improper when the evidence is subject to conflicting interpretations, *see Braniff v. Jackson Ave.-Gretna Ferry, Inc.*, 280 F.2d 523, 526 (5th Cir. 1960), the court denies the motion for the reasons set forth below.

BACKGROUND[1]

Defendant, a merchant of backhoes, loaned Romie Black a model 580-D backhoe while he was awaiting delivery of another model. The loan of the backhoe was an integral part of a sale between plaintiffs' decedent and the defendant. Plaintiffs claim that neither the defendant nor its employees provided an owners manual for the borrowed machine. Plaintiffs further allege that defendant's employees failed to warn of dangers related to use of the backhoe on sloped terrain and failed to inspect it prior to the loan. According to plaintiffs, a broken seat latch -- broken prior to the accident -- allowed the operator's seat on the machine to rotate freely, ejecting Black onto a "roll-over-protection-system" bar that was supposed to protect the driver in the event of a roll-over. The decedent died immediately after the accident as a result of head injuries.

Defendant offers a far different version of these facts. Although defendant agrees that J.I. Case is a merchant in

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[1] The court refers to plaintiffs' statement of undisputed facts in support of its motion for partial summary judgment and to defendant's response to this statement of facts. Additionally, the court refers to the parties' respective briefs.

backhoes, that the loan of this particular machine was part of a sale to the decedent and that the decedent died of head injuries, the common ground between the parties ends here. Often relying on the same depositions and affidavits from which plaintiff sees no genuine issue on the question of liability, defendant forwards evidence to suggest: 1) that an instruction manual could have been provided because of defendant's normal custom of keeping such a manual in water-tight compartment on the backhoe; 2) that prior to the loan, the store manager showed the decedent how the controls operated and supervised a test run; 3) that in any event, dangers inherent in the operation of such a machine on rough terrain should have been open and obvious; 4) that the rotating seat mechanism, if broken, could have broken during the accident; and 5) that the accident possibly was the result of decedent's own negligence because he apparently failed to fasten a seatbelt on the vehicle and tried to use it to clear heavy debris on sloped terrain.

AUTHORITY

The court agrees with the defendant that the evidence presented is subject to conflicting interpretations best left for a jury's determination. Although plaintiffs cite several summary judgment cases, the central point here is not whether the defendant has come forward with evidence to support an essential element of the defense, but whether a reasonable juror might find for the defendant. Defendant has forwarded evidence in support of its defense by using some of the same depositions and affidavits upon which plaintiffs rely. From there, the question the court must ask is whether a reasonable juror could find for the defendant.

See Anderson v. Liberty Lobby, Inc., 477 U.S. 252, 249, 106 S. Ct. 2505, 2511, 91 L.Ed. 2d 202, 212 (1986). The court cannot venture into credibility determinations, weigh evidence or draw inferences from the facts. *Honore v. Douglas*, 833 F.2d 565, 567 (5th Cir. 1987). Additionally, all facts must be viewed in a light favorable to the nonmovant. *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L.Ed. 2d 538, 553 (1986).

A request for summary judgment in a case involving an alleged breach of duty necessarily involves an uphill battle for the movant. Summary Judgment is rarely granted in such cases because the liability of a defendant is highly fact-dependent. *See, e.g., Matthews v. Ashland Chemical, Inc.*, 703 F.2d 921, 925 (5th Cir. 1983) (summary judgment ordinarily improper where issues require the determination of the reasonableness of a party's acts and the conduct of the parties under all the facts and circumstances); *Ross v. John's Bargain Stores*, 464 F.2d 111, 115-16 (5th Cir. 1972) (whether retailer was negligent in selling an item without a warning which it knew or should have known was inherently dangerous is question for the trier of fact); *Croley v. Matson Navigation Co.*, 434 F.2d 73, 75 (5th Cir. 1970) (summary judgment is generally inappropriate where the reasonable person standard must be applied to conflicting testimony). *See also* J. Moore, 6-pt. 2 *Moore's Federal Practice* Para. 56.17[42].

To support their motion for partial summary judgment, plaintiffs offer the depositions of defendant's employees and their "admissions" of liability. For example, to show

that the loan of the backhoe was unaccompanied by verbal or written warnings, the plaintiffs point to the deposition of store manager Logan Cloud in which Cloud refers to the usual practice of supplying manuals with backhoes.[2] Plaintiffs assert that no manual or instructions were given with this particular backhoe. To show that the backhoe left the store uninspected, they forward the testimony of employee David Ray and his explanation that a work order normally accompanies inspection of a machine and that no work order was found.[3] To show that a broken seat latch would allow the seat to rotate freely and to throw the decedent onto the bar of the "roll-over protection system," the plaintiffs offer the affidavit of their own expert, Richard E. Forbes, who stated that a broken seat latch would "render a backhoe unsafe for operation" and "that it would prevent the operator from exiting the equipment in a safe manner..."[4]

In keeping with the duty of a nonmovant to supply enough evidence to create a factual dispute, *see Celotex Corp. v. Catrett*, 477 U.S. 317, 324, 106 S. Ct. 2548, 91 L.Ed. 2d 265 (1986), defendant has tried to show how the evidence could be viewed favorably to the defendant. Concerning the first theory of liability forwarded by plaintiffs -- breach of warranty of merchantability --

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[2] Deposition of Logan Cloud, p. 20 to plaintiffs' "Exhibit A."

[3] Deposition of David Ray, pp. 38-40 to plaintiffs' "Exhibit F."

[4] Affidavit of Dr. Richard Forbes, p. 2 to plaintiffs' "Exhibit C."

defendant offers it supplemental answer to one of plaintiffs interrogatories regarding the expected opinion testimony of experts at trial. In this response, defendant set forth the proposed testimony of two engineers, Dr. Craig A. Depken and Charles Hanson, who suggest that "the possible mechanical failures which could occur took place when the backhoe struck the ground."[5] These experts also are prepared to comment on the possibility that the decedent did not have the seat locking mechanism in place or that his alleged failure to use the seatbelt contributed to the accident. This evidence suggests the existence of issues of fact crucial to a determination of whether the product was defective.

Regarding plaintiffs' claims of failure to warn and in particular, the alleged testimony from Cloud that no manual accompanied the loan of the backhoe, defendant correctly points out that Cloud, at best, expresses uncertainty as to the presence of a manual with the machine. He states simply that "[m]ost Case equipment has a compartment for operator's manuals" and that

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[5] Defendant's Supplemental Response to Interrogatory Number 10, pp. 4-5. Plaintiffs assert that use of this interrogatory to rebut plaintiffs' summary judgment motion is improper by pointing out that it is unsupported by affidavit. But Rule 56(c) makes clear that answers to interrogatories are but one of several materials that may be considered on a motion for summary judgment. *Fed. R. Civ. P.* 56(c).

"normally the operator's manual stay[s] with the backhoe."[6] Nor does the testimony of other witnesses show for a fact that the manual was missing when the backhoe left defendant's shop. Plaintiffs refer the court to Ray's deposition, but Ray similarly states that he "[didn't] know" whether a manual was provided.[7] Joe Robbins, another employee of the defendant, states that he personally did not give the decedent a manual, and that to his knowledge neither did any other employee.[8] None of these statements amounts to an outright declaration that Black did not receive an owner's manual. Even if such a statement were made, it would be the role of the jury, not the court, to determine whether defendant should be held liable in light of all of the other evidence presented.

Regarding the alleged lack of verbal warnings, Cloud suggested that the decedent was allowed to test the controls and run the machine before he left the shop.[9] Thus, even taking a statement of employee Robbins that he did not provide verbal instructions as true, evidence exists from which a jury could infer that warnings and instructions were given. Whether this instruction was sufficient or

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[6] Deposition of Logan Cloud, p. 19.

[7] Deposition of David Ray, p. 24.

[8] Affidavit of Joe Robbins, p.1 to plaintiffs' "Exhibit G."

[9] Testimony of Logan Cloud, p. 21 to plaintiffs' "Exhibit A."

instead contributed to a negligent failure to warn is a determination rightly left to the jury and not the court.

Finally, plaintiffs' claim that the backhoe was not inspected before it left defendant's shop is also surrounded by factual ambiguity. Although one employee stated that a work order normally accompanies inspection of a machine and although such an order could not be located, this alone is insufficient to suggests as a matter of law a total failure to inspect and maintain the backhoe. Defendant forwards the deposition of Cloud to show that many previous records were stored in crates and that defendants have tried to pull records relating to this particular backhoe. The court agrees with the defendant that the fact that no work order was located is not conclusive proof of failure to inspect; it is simply evidence that the work order cannot now be located, a factor to be considered by the jury along with the other facts in this case.

Although acknowledging at the outset of its brief that "[t]he purpose of [a] Motion for Summary Judgment is to test intrinsic merits of a case and to determine prior to trial whether any factual controversy is presented," *Southern Miss. Planning & Dev. Dist. v. Robertson,* 660 F. Supp. 1057 (S.D. Miss. 1986) and citing numerous cases to the same effect, plaintiffs seem to assume that every issue of fact has already been resolved in their favor. Even when facing strong evidence from a movant and weak evidence from the nonmovant, a trial court may act with caution and deny summary judgment where there is reason to believe the better course would be to proceed to trial. *Anderson,* 477 U.S. at 255. In this case, however, the

defendant has more than sufficiently met its burden by presenting evidence in its favor on each of plaintiffs' theories of recovery.

For all of the above reasons, plaintiffs' motion for partial summary judgment on the issue of liability is denied. A separate order in accordance with this memorandum opinion will be entered this day.

THIS 10th day of May, 1991.

/S/ GLEN H. DAVIDSON
GLEN H. DAVIDSON
United States District Judge

FILED
MAY 10, 1991
JAMIE WALKER, Clerk
By Deputy Clerk